

Supervisor's Guide to Responding to Allegations of Harassment, Violence, and Discrimination



*NOTE: When Developing Employment Practices Policies
Consult Your HR Professional and Legal Counsel*

Why Respond to Allegations?

Federal and State laws *require* state agencies to take affirmative steps to establish a safe workplace.

Properly and promptly responding to allegations of harassment, violence, and discrimination may provide an affirmative defense to an allegation of negligence.

Where do you begin?

- Immediately respond to allegations of harassment, violence, threats of violence, and discrimination.
- Don't try to handle the allegation alone; notify top management, human resources, legal counsel and law enforcement if appropriate.

Where do you begin?

- Document the response process:
 - Complete a Risk Management Fund Incident Report (SFN 50508) and file it with the Risk Management Division; and
 - Note on any investigative reports that the report is to be attached to the RM Incident Report form.

Where do you begin?

By following the Risk Management Incident reporting process it can be argued that the investigation reports will be exempt from the open records law in the event of a pending or reasonably predictable claim against the State or a state employee. N.D.C.C. § 32-12.2-11.

Addressing the Allegation

Commend employee for coming forward and assure the employee the allegation will be taken seriously.

Request the complaining employee to detail the allegations in writing. However, do not ignore anonymous allegations - follow investigation process.

Addressing the Allegation

If an employee refuses to follow through once they have indicated that they would report an instance of harassment, violence, or discrimination, if they were assured anonymity, advise the employee:

- that the matter will be pursued because now that it has been raised, the State has an obligation to investigate;
- advise them that while an attempt will be made to protect their anonymity, it cannot be assured;

Addressing the Allegation

- that efforts will be made to protect them if they fear reprisals;
- it is in their best interest and duty to make the report; and
- that failure to cooperate in the investigation could be determined to be insubordination and result in termination.

Addressing the Allegation

Advise complaining employee of:

- investigation procedure;
- State's policy prohibiting retaliation;
- method to use to report retaliation;
- requirement not to discuss investigation with other employees; and
- the possibility that investigation may not be confidential.

Addressing the Allegation

Ask complaining employee's input as to what should be done to remedy the problem.

Assure complaining employee the suggestion will be considered but employer has obligation to decide what corrective action is required.

Evaluating the Allegation

A formal investigation of the allegation is required if:

- allegations are serious in nature
- allegations identify a complex problem
- allegations involve a number of employees
- relevant facts are in dispute

Evaluating the Allegation

Even if the matter is resolved quickly and informally, the process should be documented. Documentation should include complaining employee's acknowledgement that the problem has been remedied.

Evaluating the Allegation

The allegation should be evaluated to determine if interim action is necessary.

Interim action can include:

- Temporary job reassignment;
- Allowing complaining employee time off;

Evaluating the Allegation

- Placing accused employee on administrative leave with pay pending completion of investigation;
- Ensuring safety of all employees; and
- Recommending employee assistance program, if necessary.

Evaluating the Allegation

Allegations of harassment involving rape, battery, physical touching, or other extreme conduct will necessitate interim action.

Ensure interim measures do not negatively impact complaining employee resulting in retaliation.

Planning the Investigation

Identify:

- Who will be conducting the investigation;
- What documents (e.g. personnel files) will be looked at;
- Who will be interviewed;
- The order in which people will be interviewed; and
- Standard information each person will be provided as a part of the interview

Planning the Investigation

Who will be conducting the investigation? The investigators must:

- be neutral, objective, and free from any perceived bias;
- understand their role;
- understand the issues;
- have sufficient time to investigate allegation thoroughly;

Planning the Investigation

The investigators must:

- instill confidence in the process while remaining firm enough to ask difficult questions; and
- make credible and effective witnesses should it be necessary to justify findings later.

Planning the Investigation

The investigation team should be representative of the gender of the complainant should it be necessary to ask sensitive questions.

If the accused is a high level official, consider selecting investigator from outside of the organization to avoid claims of bias or constraint.

Planning the Investigation

Prepare a list of standardized questions as well as an opening and closing statement to be given at each interview.

(See, the Risk Management format for the Investigation of Allegation of Harassment, Violence, and Discrimination on the Risk Management web site).

Planning the Investigation

To verify that the planned investigation will address the concerns raised, to avoid potential misunderstandings, and to identify any objections, prior to beginning the interview process a confirmation memo should be provided to the complaining employee.

Planning the Investigation

The confirmation memo should include:

- an outline detailing the issues to be investigated;
- a reiteration of the facts alleged by the complaining employee;
- the names of the investigators; and
- direction not to discuss issue with others.

Preparing for the Investigation

Prior to conducting any interviews:

- review personnel policies;
- frame questions according to allegations and policies;
- arrange to document interviews, i.e. assign task of taking hand written notes that contain date, location, names of people present, and starting and ending time of interview.

Conducting the Investigation

- Interview every person identified as potentially having information.
- Tell each person interviewed:
 - Purpose of investigation.
 - Employer takes the allegations seriously but no conclusions have been made.
 - They have a duty to answer all questions asked.

Conducting the Investigation

- Tell each person interviewed:
 - they are to disclose all information they have relevant to the allegations;
 - failure to cooperate may result in disciplinary action up to and including termination;
 - they are not to discuss the investigation with other employees;

Conducting the Investigation

- retaliation is prohibited and explain the consequences for engaging in retaliatory conduct; and
- explain what will happen during the remainder of the investigation process.

Conducting the Investigation

- To begin the interview ask broad, open-ended, standard questions and then move on to specific questions.
- Press for details; do not accept generalities; ask follow-up questions.
- Ask interviewee to put things in chronological order or give relevant time periods.

Conducting the Investigation

- Ask if anyone else can substantiate the information they are providing.
- Ask questions testing their veracity.
- Note participant's demeanor and body language.

Conducting the Investigation

At the conclusion of the interview:

- ask if interviewee has any additional information such as documents, memos, notes, e-mails regarding the inappropriate workplace behavior allegations;
- tell them if they remember any other pertinent information they should contact investigators;

Conducting the Investigation

- request interviewee to verify investigator's understanding of the interviewee's answers, i.e., provide a signed statement; and
- request the interviewee to sign and date the notes taken during the interview.

Conducting the Investigation

Remember –

- Balance the needs of ending the inappropriate behavior with protecting the rights and reputation of both complainant and accused.
- Excessive publication of the charges and investigation information during the investigation must be avoided.

Conducting the Investigation

Remember –

- Investigators, agency officials, and other employees must refrain from discussing the charges and related information outside the context of the investigation.

Evaluating the Investigation

Determine what facts are supported by the evidence gathered.

Base the determination on competent information coming from individual's personal knowledge.

Evaluating the Investigation

Findings based on hearsay, innuendo, or rumor may expose State to liability if the State acts on that information.

The investigation may have to be continued to obtain additional information.

Evaluating the Investigation

When assessing credibility of information consider:

- interviewee's demeanor;
- consistency of statements especially when weighed against statements of others;
- plausibility of statements; and
- whether interviewee was fully cooperative.

The Investigation Report

After resolving any conflicting statements and assessing credibility, the investigators should detail their findings in an investigation report to upper management for upper management to use to make a decision on what corrective action should be taken.

The Investigation Report

The report should outline the findings of the investigators and should describe how the investigation was conducted.

The report must be written in a manner which persuasively supports the ultimate findings.

The Investigation Report

If credibility was a determinative factor, the report should identify how and why one person or one description of events was more credible than another.

The Investigation Report

The findings should be written in terms of the specific unacceptable conduct at issue; not in legally conclusory terms such as “hostile work environment,” “discriminatory,” “sexual harassment.”

The Investigation Report

A draft of the investigation report should be reviewed by legal counsel before the report is finalized to determine whether it meets legal standards.

Taking Corrective Action

After investigation and report are completed, management must decide what corrective action, if any, should be taken.

Any corrective action must end inappropriate behavior.

The employer is obligated to follow up to ensure the inappropriate behavior has stopped.

Taking Corrective Action

When inappropriate workplace behavior is substantiated, to determine the proper corrective action ask:

- Was the incident an isolated incident or does it reflect a pattern of inappropriate behavior?
- Was the incident severe enough to objectively create a hostile work environment?

Taking Corrective Action

- Is the person that engaged in inappropriate workplace behavior a supervisory employee?
- Has any supervisory employee failed to report or act on known or suspected inappropriate behavior?
- What were the prior relationships between the employees involved?

Taking Corrective Action

- Did the incident involve inappropriate physical touching?
- Did the complaining employee in any way indicate that the behavior was welcomed?
- Have there been past instances of inappropriate workplace behavior at the job site?

Taking Corrective Action

- Were verbal comments made in a derogatory or hostile fashion or merely unintended offensive utterances?
- Is there anything which would indicate that women or any other protected class were singled out for differential treatment?

Taking Corrective Action

In cases where inappropriate workplace behavior is **not** substantiated, the employer should review the employer's relevant policies prohibiting harassment with the complainant and the accused.

The complainant should be told that the employer intends to protect the employee from . . .

Taking Corrective Action

... inappropriate workplace behavior and the employee should report any subsequent incidents of perceived inappropriate behavior or retaliation.

Taking Corrective Action

The accused should be firmly told that any acts of inappropriate behavior or retaliation will result in disciplinary action up to and including termination.

Taking Corrective Action

When harassment is not substantiated, consider separating the complainant and alleged harasser if it can be done without impacting the complainant negatively or operate as a disciplinary measure against the alleged harasser.

Taking Corrective Action

If allegations are widely known amongst employees, employer should reiterate to **all** employees its policy of zero tolerance - prohibiting all forms of harassment and retaliation against those that report inappropriate workplace behavior or participate in an investigation.

Closing an Investigation

Close an investigation by making the complainant and the accused aware of the conclusion of the investigators and documenting the investigation activities and results in the appropriate files.

Closing an Investigation

If disciplinary action is implemented as a result of an investigation, the employee should be made aware of the appeal process.

Final Investigation File

Because an employer may be called upon to show how it responded to claims of harassment, violence, or discrimination long after the fact, the final investigation report, all supporting notes and memorandum generated during the investigation, and documents related to any correction action taken should be filed in a final workplace investigation file separate from any employee's personnel file.

Resources

Remember, don't try to handle an allegation of harassment, violence, and discrimination alone. Notify top management, human resources, legal counsel and law enforcement if appropriate.

Resources

The “State’s formalized process to address harassment, violence or discrimination allegations:”

- The Attorney General’s directive titled *Response to Allegation of Harassment, Violence, and Discrimination*;
- The *Risk Management Investigation of Allegations of Harassment, Violence, and Discrimination Questionnaire*

Copies on the Risk Management web site under “Loss Control/Forms.”